

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH ETHERAGE and KIRSTIN
ETHERAGE, and the marital community
thereof,

Plaintiffs,

v.

UNITED STATES,

Defendant.

No. CV11-5091-BHS

STIPULATION AND PRIVACY ACT
PROTECTIVE ORDER

STIPULATION

Plaintiffs Joseph and Kirstin Etherage and Defendant United States of America, by and through their undersigned counsel of record, hereby respectfully stipulate and agree to the following:

1. This Stipulation and Privacy Act Protective Order is agreed to and entered into pursuant to Fed. R. Civ. P. 26(c), which provides for the issuance of protective orders limiting the disclosure of privileged and confidential documents and information in appropriate circumstances, and 5 U.S.C. § 552a(b)(11), which provides an exception to the Privacy Act of 1974 for documents and information released pursuant to a court order.

1 2. This Stipulation and Privacy Act Protective Order relates to an action
2 initially brought by Plaintiffs against Johnny and Jane Doe West. The United States has
3 been substituted as the sole defendant in place of Johnny and Jane Doe West pursuant to
4 the Westfall Act and a certification by United States Attorney Jenny A. Durkan that at all
5 times relevant to the lawsuit, Mr. West was acting in the course and scope of his federal
6 employment. The parties are currently in the process of conducting discovery relevant to
7 a potential scope challenge that may be brought by the Plaintiffs.

8 3. Some of the discovery requested by Plaintiffs seeks disclosure of
9 documents and information that Defendant contends may be protected from release by the
10 Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, Plaintiffs seek various documents
11 and information pertaining to employees of DHS that may constitute “records” as defined
12 by the Privacy Act. A “record” is defined by the Privacy Act as “any item, collection, or
13 grouping of information about an individual that is maintained by an agency, including,
14 but not limited to, his education, financial transactions, medical history, and criminal or
15 employment history and that contains his name, or the identifying number, symbol, or
16 other identifying particular assigned to the individual. . . .” 5 U.S.C. § 552a(4).

17 4. While Defendant contends that disclosure of such documents and records
18 ordinarily is prohibited in civil litigation, the Privacy Act provides, as an exception, that
19 such records may be released “pursuant to the order of a court of competent jurisdiction.”
20 5 U.S.C. § 552a(b)(11). An order of this Court, therefore, would provide a basis for
21 release of the requested documents and records pursuant to the Privacy Act and Fed. R.
22 Civ. Pro. 26(c), as well as insulate Defendant from potential liability for improper
23 disclosure. *See* 5 U.S.C. § 552a(g)(1).

24 5. The purposes of this Stipulation and Privacy Act Protective Order include
25 protecting the confidentiality of certain documents and information, and ensuring that the
26 parties can obtain and pursue discovery with a minimum of delay and expense.
27 Accordingly, the parties, subject to the Court's approval, stipulate and agree that the
28 procedures set out in the ensuing Order shall be followed whenever counsel believes that

1 formal or informal discovery in the above-captioned case, in whatever form, may reveal
2 or has revealed documents or information that may be protected by the Privacy Act.
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4 Stipulated to and presented by this 3rd day of February, 2012.
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6 DITLEVSON ROGERS DIXON, P.S.

JENNY A. DURKAN
United States Attorney

8 /s/ Joe D. Frawley

/s/ Rebecca S. Cohen

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PRIVACY ACT PROTECTIVE ORDER

THIS MATTER came before the Court on the parties' Stipulation for a Privacy Act Protective Order to authorize the production of confidential materials protected by the Privacy Act. Having considered the stipulation of the parties, it is now hereby ORDERED that the parties are bound by the following conditions, definitions, and terms.

A. DEFINITIONS

1. "Privacy Act Confidential" information includes documents designated by any party as such, as specified in Section B below.

B. SCOPE, TERMS, AND REQUIREMENTS OF THIS ORDER

1. Notwithstanding any other provision of 5 U.S.C. § 552a, the United States, its officers, agents, employees, attorneys, and representatives are hereby authorized under 5 U.S.C. § 552a(b)(11) to respond to discovery requests propounded by Plaintiff by producing documents covered by the Privacy Act and pertaining to employees of the United States Army other than Plaintiff. *However, with respect to any federal employee other than Plaintiff, all social security numbers, home addresses, home phone numbers, personal email addresses, employee identification numbers, dates of birth, medical information, and financial information must be redacted from the documents prior to production.*

2. A party who produces documents in discovery may designate a document as "Privacy Act Confidential" only when such party in good faith believes it contains information protected from disclosure by the Privacy Act. Except for documents produced for inspection at the party's facilities, the designation of such documents shall be made prior to, or contemporaneously with, the production or disclosure of that information. In the event that documents are produced for inspection at the party's facilities, such documents may be produced for inspection before being marked Privacy Act Confidential. Once specific

1 documents have been designated for copying, any documents containing confidential
2 information will then be marked Privacy Act Confidential after copying but before delivery
3 to the party who inspected and designated the documents. There will be no waiver of
4 confidentiality by the inspection of confidential documents before they are copied and marked
5 Privacy Act Confidential pursuant to this procedure.

6 3. No such document or information contained in such a document may be
7 released or disclosed to any person other than:

- 8 a. The parties and their counsel;
- 9 b. Outside consultants and experts consulted or retained for the purpose
10 of assisting in the preparation of this action, upon condition that,
11 before making disclosure, the party disclosing the confidential
12 information must obtain and retain an agreement in writing from the
13 outside expert or consultant reciting that he or she has read a copy of
14 this Stipulation and Order and agrees to be bound by its provisions;
- 15 c. Witnesses at trial or deposition, provided that they are
16 first made aware of the confidential nature of the documents and the
17 terms of the Order, and provided that the documents remain subject to
18 this Order; and
- 19 d. Any other person mutually authorized by all counsel to examine such
20 materials.

21 4. Any person having access to Privacy Act Confidential information shall be
22 informed that it is confidential and subject to a non-disclosure Order of the Court. No
23 such person shall release or disclose those materials to any person other than those
24 specifically identified in paragraph 3, above, without further order of the Court or
25 stipulation of the parties.

26 5. To the extent that any materials subject to this Privacy Act Protective Order
27 (or any pleading, deposition exhibit, motion or memorandum referring to them) are
28 proposed to be filed or are filed with the Court, the parties agree they will seek to file all


1 such documents under seal pursuant to a stipulation between the parties or motion in
2 accord with Local Rule 5(g), unless the parties agree that the documents can be redacted to
3 remove the confidential information.

4 6. A designation of confidentiality may be challenged upon motion. The
5 burden of proving the confidentiality of designated information remains with the party
6 asserting such confidentiality.

7 7. The Order shall survive the final termination of the action and the Court
8 shall retain jurisdiction to resolve any dispute concerning the use of the information
9 disclosed hereunder.

10 8. Upon final determination of this action, unless otherwise agreed to in writing
11 by the parties or subject individuals, all parties and their counsel shall assemble and return
12 or destroy all documents produced pursuant to this Order, including all copies thereof and
13 notes therefrom, except that counsel may retain copies of the subject information to the
14 extent it is used in pleadings, exhibits, and/or becomes work product, to the attorneys
15 representing the party who produced the documents.

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17 DATED this 6th day of February, 2012.

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20 BENJAMIN H. SETTLE
21 United States District Judge
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